

IN THE HIGH COURT OF DELHI AT NEW DELHI
ORDINARY ORIGINAL COMMERCIAL JURISDICTION

IA No. _____ of 2021

In

CS (COMM) NO. 572/2020

IN THE MATTER OF

Elsevier Ltd. & Ors

...Plaintiffs

Vs.

Alexandra Elbakyan & Ors

...Defendants

And

IN THE MATTER OF:

1. Tejaswi Chhatwal

2. Jagannath Kumar Yadav

3. Madhurima Kundu

4. Chitrangada Sharma

5. Piyush Chhabra

[REDACTED]
[REDACTED]

6. Rini Dasgupta

[REDACTED]
[REDACTED]
[REDACTED]

7. Srishti Walia

[REDACTED]
[REDACTED]

... Applicants

DATE: 22.10.2021
PLACE: NEW DELHI

[REDACTED]

APPLICANTS THROUGH
VRINDA BHANDARI, ABHINAV SEKHRI,
TANMAY SINGH, KRISHNESH BAPAT
& ANANDITA MISHRA
E-215, THIRD FLOOR, EAST OF KAILASH
NEW DELHI, 110065

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AND IN THE MATTER OF

Tejaswi Chhatwal & Ors

...Applicants

**APPLICATION FOR INTERVENTION UNDER ORDER 1
RULE 8A AND ORDER 1 RULE 10(2) READ WITH
SECTION 151 OF THE CPC, 1908 ON BEHALF OF A
GROUP OF SCHOLARS STUDYING/WORKING IN
UNIVERSITIES ACROSS THE NATIONAL CAPITAL
TERRITORY OF DELHI**

Most Respectfully submits:

1. This application for intervention is being filed by seven researchers from the community of social scientists. The Applicants seek permission from this Hon'ble Court to intervene in the instant proceedings where Plaintiff Nos. 1 to 4 have sought directions to Defendant Nos. 3-13 to block access to websites owned / controlled by Defendant Nos. 1-2 (the '**Defendant Websites**'). The Applicants are concerned that if the prayers sought by Plaintiff Nos. 1 to 4 are granted, it will prejudicially affect social science research in India.

Thus, as is elaborated in subsequent paragraphs, the Applicants are affected by the adjudication of the legal issues in the instant proceedings and seek the leave of this Hon'ble Court to intervene in them.

I. DETAILS OF THE APPLICANTS

2. The Applicants are social-science researchers affiliated with universities across the NCT of Delhi. As a part of their research, they extensively study human society and how people behave and influence the world. Their research improves the collective understanding of the world, which is an end in itself and also contributes to policymaking and the development of our country.
3. The Applicants seek leave to intervene in the ongoing proceedings before this Hon'ble Court due to the unique importance of the Defendant websites in enabling the Applicants to continue with personal research and discharge their professional obligations. As elaborated subsequently in the present Application, the Applicants submit that in spite of their position of being affiliated with prestigious universities across the NCT of Delhi which provide institutional access to scholarly resources, they remain without access to countless essays / books / articles that are unreachable behind the paywalled gateways of Plaintiff Nos. 1-4. The Defendant Websites enable the Applicants to access such articles, as well

as various non-protected articles, and thus play a critical role in supplementing their research.

4. The Applicants' reliance on the Defendant Websites has incomparably increased during the pandemic where, on account of the indefinite closure of university premises, they lost access to library resources and, in many cases, also to the institutional access to research databases. The Applicants submit that they were only able to continue their research due to the existence of Defendant Websites, since Plaintiff Nos. 1-4 have exorbitantly priced access to works for which they hold copyright licenses such that it is practically impossible for individuals to make use of the same.
5. Since access to such material is a right of the Applicants as recognized by copyright law, under *inter alia* Section 52(1)(a) of the Copyright Act 1957 ("**Copyright Act**"), the Applicants seek the leave of this Hon'ble Court to make submissions on the impact any decision blocking Defendant Websites may have and the legality of such a decision.
6. The following paragraphs provide details about the Applicants:
 - a. **Tejaswi Chhatwal** is enrolled in a PhD programme at the Centre for the Study of Law and Governance at Jawaharlal Nehru University, Delhi. Her research concerns the implementation of the Scheduled Castes and Scheduled

Tribes (Prevention of Atrocities) Act, 1989. Apart from this, she is also working as a teaching assistant to a professor at her university. The position requires her to teach students. The PhD programme, and her position as a teaching assistant requires her to simultaneously consult several books, treatises and journal articles. She is unable to buy these books/journal articles because the Plaintiffs and other publisher's charge a premium for it, and she cannot issue these books from her university's library because of COVID-19, and because there is a limit on the number of books that may be issued at a time. Moreover, several books/journal articles that she requires and relies on are not available in her university's library. For example, recently she could not locate the following books/journal articles which are essential for her research in her university library but was able to use the digital library of Defendant No.2 ("**Lib-Gen**") to access them:

- i. '*Caste and Law*' by Dag Erik Berg
- ii. '*Caste: the origins of our discontents*' by Isabel Wilkerson
- iii. '*Marking Time: Art in the Time of Mass Incarceration*' by Nicole R. Fleetwood
- iv. '*Are prisoners obsolete*' by Angela Davis

- v. *'The Sonic Color Line: Race and the Cultural Politics of Listening'* by Jennifer Lynn Stoeber
- vi. *'Forensic Architecture'* by Eyal Weizman
- vii. *'Lived experiences: Marriage, notions of love, and kinship support amongst poor women in Delhi'* by Shalini Grover
- viii. *'The Gulf in the imagination: Migration, Malayalam cinema and regional identity'* by Ratheesh Radhakrishnan
- ix. *'The politics of naming: The search for linguistic and ethnic identity in Tamil Nadu'* by Rama Meganathan
- x. *'Flexible work, gender and globalised production: A study of the jewellery sector in North India'* by Urvashi Soni-Sinha.

Accordingly, since the materials required for Petitioner No. 1's research are not available in the university's library, LibGen is her only source of books, treatises and commentaries.

- b. Jagannath Kumar Yadav is pursuing a PhD from the University of Delhi. He has been researching the political impact of Buddhism for the past two years, and prior to that he completed his M.Phil. He primarily uses Lib-Gen to access books and other secondary material crucial to his

research, and uses the website owned by Defendant No. 1 (“Sci-Hub”) to access journal articles.

- c. **Madhurima Kundu** is pursuing MPhil in Economics from the Centre for Studies in Regional Development at Jawaharlal Nehru University. Her research examines the market concentration and competition policies in India. She uses Sci-Hub to access data-based research which is essential to her research.
- d. **Chitragada Sharma** is pursuing PhD at Jawaharlal Nehru University, Delhi. Her research is focused on the law on image-based sexual abuse in India. Since her research is interdisciplinary, she is required to study books and treatises related to Sociology, Anthropology, Media-Studies and Political Science. Lib-Gen provides her the option of accessing these books without incurring a prohibitively exorbitant cost. She is also a teaching-assistant to a professor at her university, and in the course of instruction relies on the Defendant Websites to provide material to her students.
- e. **Piyush Chhabra** is currently pursuing an M.Phil in Cinema Studies at Jawaharlal Nehru University, Delhi, exploring the intersection between law and popular culture. The Defendant Websites enable him to locate his research around the work of his contemporaries.

f. **Rini Dasgupta:** Rini is currently enrolled in the M.Phil programme in Cinema Studies at Jawaharlal Nehru University, Delhi. She is examining the informal network of popular film and media circulation in India.

g. **Srishti Walia:** Srishti is a PhD scholar in Cinema Studies at Jawaharlal Nehru University, Delhi. She is currently studying Gender and Bombay Cinema. She uses Lib-Gen to access books because the treatises required for her research are often unavailable in her university's library, and are prohibitively expensive if she attempts to procure such material independently of her university's library.

Similar to Applicant No. 1, Applicant Nos. 2-7 also have been unable to access materials crucial to their research in the libraries of the universities with which they are associated, and have had no other option but to turn to LibGen or SciHub.

II. IMPACT OF THE INSTANT PROCEEDINGS ON THE APPLICANTS

7. The Applicants herein have a real, subsisting and profound interest in the instant proceedings, and it is in the public interest to allow them to present their opinion on the question of law involved in the case for, inter alia, the following reasons:

a. On 06.01.2021, this Hon'ble Court in the instant proceedings issued a notice in two applications for

intervention under Order I Rule 10(2) read with Order I Rule 8A of the Code of Civil Procedure. These applications were preferred by - Delhi Science Forum and Ram Ramaswamy Medico Friends Circle and Others. Subsequently, on 15.07.2021 notice was also issued in an application for intervention by Forum for Medical Ethics Society. These bodies represent the interests of the scientific and the medical community, and they stand to be affected if access to Sci-Hub is blocked. However, the interest of the social scientist community stands unrepresented before the Hon'ble Court in the instant proceedings. As is detailed below, this community will be gravely prejudiced if access to Lib-Gen is blocked. This impact on the community of social scientists cannot be put forth before this Hon'ble Court by the bodies mentioned above. The Applicants, on the other hand, are competent to assist this Hon'ble Court on the impact the blocking of Lib-Gen and Sci-Hub will have on them and on the broader community of Indian social scientists. It is also important to permit the Applicants to intervene because Lib-Gen is presently unrepresented before this Hon'ble Court.

- b. This Hon'ble Court in *The Chancellor, Masters and Scholars of University of Oxford and Ors. vs Rameshwari Photocopy Services and Ors.*, 235 (2016) DLT 409 had permitted the Society for Promoting Educational Access

and Knowledge to intervene which represented the interests of academics. The Applicants herein similarly represent the interests of social scientists which are too numerous to approach this Hon'ble Court individually. Thus, it is in the public interest that this Hon'ble Court permits instant intervention in the present proceedings.

c. Lib-Gen is the largest free library in history. It provides access to 84 million scholarly articles, 6.6 million academic and general interest books and 381 magazines. It is sourced largely through individuals putting up copies on the Lib-Gen servers. The website does not charge any money to provide access to this material even as it undertakes costs to maintain its servers. Lib-Gen is one of the primary sources for the development of social sciences in the country. If the suit is decreed in favour of the Plaintiffs and access to Lib-Gen is blocked, social science researchers will not be able to continue with their research. They will not be able to meaningfully engage with social scientists from other countries, expand our collective knowledge and continue to contribute to policy building. Thus, their ability to access knowledge and to impart it will be severely compromised.

d. Lib-Gen is the only available, and meaningful, source of accessing social science-related research for the Applicants, countless other similarly placed researchers,

and other persons who are not fortunate enough to be affiliated with universities, because the Plaintiffs have dominant control over the publication of social science research and they charge a hefty price to anyone who needs to access such information. Whereas, Lib-Gen, being a free digital library, has democratised access to knowledge resources not only by eliminating paywalls but also providing access from any physical location as long as the person has access to the internet.

- e. This is not to say that Applicants exclusively use Lib-Gen for their research. The Applicant also relies on Sci-Hub for academic material for which publishers charge an exorbitant amount, rendering it impossible for ordinary persons to access such material. According to one study, the five biggest publishers in the world, which includes Plaintiffs No. 1 to 3, published more than half of the social science research. The cost of accessing even a single article published by journals ultimately owned by these Plaintiffs is around INR 3000 (Three Thousand Rupees Only), which is prohibitively expensive. This is especially because in the course of their research which may be directed either towards teaching or the writing of a single article or book, the Applicants are required to access and read hundreds of books, articles, research papers and other studies.

A true copy of the study titled '*Oligopoly of Academic Publishers in the Digital Era*' authored by Vincent Larivière, Stefanie Haustein and Philippe Mongeon is annexed herewith as **Document -1**.

- f. Apart from the above, both Lib-Gen and Sci-Hub offer incomparable access to up-to-date research, which is practically impossible for un-affiliated private researchers and extremely difficult even for persons such as the Applicants who enjoy a degree of institutional access. The social science field is one of constant evolution, debate, and discussion, where the participants to the academic conversation belong to all parts of the globe. Failure to keep pace with this constantly developing research renders the Applicant's output outdated.
- g. The Applicants are not the target audience for the Plaintiffs — they are, it is humbly submitted, irrelevant to the profit-seeking motives of Plaintiffs which primarily engage with academic institutions and other such entities which purchase subscriptions. That institutions of global-renown have also struggled to meet the subscription prices offers an indication of the prohibitive pricing adopted by the Plaintiffs which has, effectively, priced out the knowledge commons and placed it in the hands of an elite few.

A true copy of an article by the Vox titled '*The costs of*

academic publishing are absurd. The University of California is fighting back' and dated 1st March, 2019 is annexed herewith as **Document -2**.

- h. The prohibitive pricing of the Plaintiffs casts a serious burden upon the publicly funded academic institutions in India where Applicants undertake their research, which in turn requires Applicants to rely upon the Defendant Websites to satisfactorily undertake their research. Due to the restricted physical access to the academic institutions on account of the pandemic, the reliance upon the Defendant Websites has increased immeasurably, as not only are Applicants unable to access libraries but are also unable to access databases which their institutions subscribe to on account of attendant technical restrictions on remote access. Applicants submit that without the Defendant Websites, it would have been impossible for them to undertake any meaningful research.
- i. Applicants submit that, to the best of their knowledge, individual users relying upon Defendant Websites have not dented the profit margins Of the Plaintiffs. The profit margins of the Plaintiffs are much higher than those of enterprises in other industries such as oil, medicines and technology. Thus, the Plaintiffs' plea of blocking the Defendants Websites only serves their self-interest of increasing their coffers without benefitting society. In fact,

granting the Plaintiffs' reliefs will have a detrimental impact on the social science research undertaken in India and the careers of the Applicants and those they represent before this Hon'ble Court. The unavailability of the Defendant Websites will also stunt the academic growth of the nation.

A true copy of the relevant pages from RELX's (Parent company of Plaintiff No.1) Annual Report and Financial Statements 2020 is annexed herewith as **Document -3**.

- j. The blocking of the Defendants Websites is not in the societal interest and is also against the law. The statutory law on copyright and the settled jurisprudence recognises that mere usage does not constitute infringement. The Applicants are proper and necessary parties to the instant proceedings because they are dependent on the material owned by the Plaintiffs for research purposes. As is detailed in the next section, under the law, such use does not constitute infringement. The Applicants seek to assist this Hon'ble Court regarding the right of researchers to access copyrighted material under the Copyright Act.

III. APPLICABLE LEGAL STANDARD

8. While the Plaintiffs are correct that the Defendant Websites make available material exclusively licensed to the Plaintiffs in the course of their operation as a digital library, the same

does not constitute infringement. The Plaintiffs have copyright to the literary work they own under Section 14(a) of the Copyright Act. These rights are subject to the provisions of the Copyright Act. Thus, if literary material is used for any of the purposes mentioned under Section 52 of the Copyright Act, such use cannot constitute infringement.

9. The Applicants' use of and the Defendant Websites making available the material owned by the Plaintiffs is permissible under *inter alia* Section 52(1)(a)(i) of the Copyright Act. According to this provision, '*fair dealing with any work*' shall not constitute an infringement of copyright if it is for '*private or personal use, including research*'. Providing access to material by the Defendant Websites constitutes '*fair dealing*' since it complies with the conditions recognised by this Hon'ble Court in *Division Bench in India TV Independent News Service Pvt. Ltd. and Ors. v. Yashraj Films Pvt. Ltd* FAO (OS) 583/2011. That is, the access to books and articles provided by Defendant Websites is not for commercial use, it is essential for research, it permissibly copies the entirety of copyrighted work, and it does not *substantially impact* the market (universities) in which the Plaintiffs sell the copyrighted works. This '*fair dealing*' by the Defendant Websites is for research as in the absence of these websites, the Applicants could not have conducted research.

10. In addition to the above, the Applicants' use of and the Defendant Websites providing access to the material owned by the Plaintiffs is also permissible under Section 52(i)(i) of the Copyright Act which permits reproduction of any work '*in the course of instruction*'. As has been detailed above, the Applicants work as teaching assistants to professors in their universities and use the Defendant Websites to access material to teach their students. The Defendant Websites are necessary to enable the Applicants to perform their duties as teaching assistants.
11. The access to the material owned by Plaintiff and made available by Defendant Websites for research and impart education must be construed as the 'right' of the Applicants rather than as a limited exception. The Hon'ble Supreme Court of Canada in *CCH Canadian Ltd. vs Law Society of Upper Canada*, [2004] 1 SCR 339 has held that any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. This Hon'ble Court has also recognised this understanding of the fair dealing exception in *Wiley Eastern Ltd. vs Indian Institute of Management (1996 (15) PTC 375 (Del))* where it held that the basic purpose of Section 52 of the Copyright Act is to protect freedom of expression under Article 19(1)(a) of the Constitution. As such, the research exception under Section

52 of the Copyright Act must be construed as a right accruing in favour of the Applicants, and the public at large. Accordingly, the Applicants have an affirmative right to access the material made available by the Defendant Websites, and the prayers sought by the Plaintiffs, if granted, will constitute a breach of the Applicants' right to access such material.

12. In addition to the above, the Applicants contest the legal basis of the reliefs sought by the Plaintiffs. The Plaintiffs have not only sought removal of available material which may be infringing. Instead, they have asked this Hon'ble Court to block the Defendant Websites entirely and prevent them from ever operating a website again. This relief has been raised in a *lis* between private parties but it operates *in rem*, and has serious implications for the Applicants. The Defendant Websites are not only essential to their livelihood but also enables them to advance academic standards in the country. Thus, any decision to block access to these websites will disproportionately impact the Applicants by preventing them from accessing information from the internet. The impact on the Applicants must be seen in the light of the fact that there are less restrictive reliefs which could have been sought such as blocking access to only such material which is found to be infringing the Plaintiffs' copyright, instead of blocking the entirety of the Defendant Websites.

13. The Applicants respectfully submit that this Hon'ble Court ought to consider Article 19(1)(a) that recognises the fundamental right of accessing information before issuing any order blocking the Defendant Websites. Previously, this Hon'ble Court has recognised that the protection of the fundamental rights under Article 19(1)(a) is the purpose of Section 52 of the Copyright Act. Further, the Hon'ble Supreme Court has recognised that freedom of expression over the medium of the internet enjoys constitutional protection under Article 19(1)(a) in *Anuradha Bhasin v. Union of India* (2020 3 SCC 637) and that any restriction upon such fundamental rights should be in consonance with the mandate under Articles 19(2) of the Constitution, including the test of proportionality. Any such order will not only block access to already existing material but will also prevent Defendant Websites from ever publishing legitimate material. According to settled law, pre-publication censorship cannot be tolerated in view of Article 19(1)(a), and where it is a legitimate restraint on freedom of speech, it must be exercised on a definite principle that does not leave room for arbitrary action (*S. Rangrajan vs P. Jagjivan Ram*, (1989) 2 SCC 574). However, any blocking order will be arbitrary as it will censor information that could have been published in future without any judicial examination of its legality.

14. The Applicants also submit this Hon'ble Court ought to also consider that Section 69A of the Information Technology Act, 2000 ('IT Act') provides a complete code for blocking information on the internet including blocking of websites. Under the provision, only the Central Government, through the Ministry of Electronics and Information Technology, may block access to content on the internet. Such an order can only be issued if it is necessary for the interest of sovereignty and integrity of India, defence of India, security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognisable offences related to the above. The Central Government also has to comply with the procedural requirements provided in the Information Technology (Procedure and safeguards for blocking for access of information by the public) Rules, 2009 before blocking content on the internet.
15. In contrast to Section 69A of the IT Act, Section 55 of the Copyright Act empowers this Hon'ble Court to grant injunction only when '*copyright in any work has been infringed*'. The provision does not permit censoring material that has not yet been published. However, the Plaintiffs herein have asked this Hon'ble Court to do precisely that by *first*, blocking already existing material on the Defendant Websites which does not infringe copyright; and *second*, by preventing Defendant Websites from ever publishing any material even

though such material may not infringe the copyright of the Plaintiffs.

16. The Applicants are cognizant that this Hon'ble Court in *UTV Software Communication Limited and Ors vs 1337x.To and ors* [CS(Comm) 724/2017] has used its inherent powers under Section 151 of the Code of Civil Procedure, 1908 ("CPC") to classify websites as 'rogue' and block access to them. In this regard, the Applicants respectfully submit that the classification of rogue websites cannot extend to the present case. The Defendant Websites ought not to be blocked because they contain legitimate content. Such content furthers public knowledge. Moreover, the harm caused to the audience in *UTV* by blocking access to pirated movies is distinguishable from the impact on the Applicants of an order blocking access to Defendant Websites. As detailed above, any blocking order will prevent the Applicants from conducting research which is evidently against the public interest. Thus, blocking the Defendant Websites does not further the ends of justice.
17. The Applicants lastly submit that no prejudice will be caused to the parties if the Applicants are permitted to intervene in this matter given the considerable public interest and the substantial questions of legal and constitutional importance which arise in the present case. This application is made *bona fide* and in the interests of justice. Therefore, it is prayed that

the Applicants be permitted to intervene in the present proceedings and assist this Hon'ble Court by way of any written and/or oral submissions.

18. Moreover, by adding the Applicants to the array of parties, no prejudice will be caused to the parties already on record. The submissions of the Applicants are limited to points of law that concern the public interest. On the other hand, not making the Applicants party to the present proceedings will cause serious prejudice to the interests of social scientists across the country given that the Plaintiffs have sought to block websites that enable research.

PRAYER

In the premises, it is most respectfully prayed that this Hon'ble Court may be pleased to:

- a. Permit the Applicants to intervene and assist this Hon'ble Court in the present proceedings by making written and oral submissions; and
- b. Pass any other order or direction as this Hon'ble Court may deem just and proper in the facts and circumstances of the instant case and in the interest of justice.

AND FOR THIS ACT OF KINDNESS, THE APPLICANTS
AS IN DUTY BOUND SHALL EVER PRAY



APPLICANTS THROUGH

Filed By:

DATE: 22.10.2021

PLACE: NEW DELHI



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